Supreme Court, U. S.
FILED
MAR 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-353, 75-354 and 75-355

HOWARD PIPER, *et al.*,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

BANGOR PUNTA CORPORATION, *et al.*,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONSE OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC. TO PETITIONERS' REPLIES TO THE SOLICITOR GENERAL'S BRIEF

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
STUART ROBINOWITZ
JACK C. AUSPITZ
ANTHONY M. RADICE
CAROL GOODMAN
Of Counsel

SIMON H. RIFKIND
ARTHUR L. LIMAN
Attorneys for Respondent
345 Park Avenue
New York, New York 10022

IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-353, 75-354 and 75-355

HOWARD PIPER, *et al.*,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

THE FIRST BOSTON CORPORATION,

Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

BANGOR PUNTA CORPORATION, *et al.*,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONSE OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC. TO PETITIONERS' REPLIES TO THE SOLICITOR GENERAL'S BRIEF

The Solicitor General, concluding that this case was correctly decided and that there are no conflicts among the Circuits, has recommended a denial of the petitions for certiorari. His views are fully supported by the record and traditional principles of law.

The Second Circuit has decided this case in Chris-Craft's favor on three separate occasions over a span of seven years. This Court denied certiorari in 1973 (414 U.S. 910). And the *Chris-Craft* opinions have already been followed in at least 50 reported cases across the nation precisely because they reflect sound and traditional legal principles.

Petitioners now accuse the Solicitor General of personal bias—namely, of distorting the issues and taking a "partisan" and "cavalier" view in order to "preserve the decision below at all costs."* Such intemperate personal attacks, wholly improper, are apparently made out of desperation because petitioners cannot raise any genuine issues worthy of certiorari. The fact is that the Solicitor General, as an independent officer of ·· Court, gave fair, impartial and careful attention to this complex factual case over a period of four months in response to this Court's directive.**

* First Boston Br. at 1-2; Bangor Br. at 6; Pipers' Br. at 2.

** The Solicitor General and his staff first received separate submissions from the SEC and the Treasury Department and then held a series of meetings with counsel for the various parties. This intensive review process, which involved a study of many hundreds of pages of opinions and briefs in this case, as well as independent research, consumed the period from November 1975 to the end of February 1976.

Petitioners also distort the Solicitor General's views by stringing together quotations ripped out of context from different sections of his brief. For example, petitioners claim that the Solicitor General suggested that several issues were worthy of certiorari, whereas in fact he flatly and squarely recommended against certiorari. Similarly, petitioners claim that the Solicitor General found that the damage award was excessive by $15 million, whereas in fact he proposed an alternative formula that yielded virtually identical damages and concluded that the damage issue was not worthy of certiorari (S.G. Br. at 24).

Liability Issues

This Court previously denied certiorari on all of the liability issues. The Second Circuit labeled petitioners' liability arguments as "frivolous" (B 40, n. 30). And now the Solicitor General has independently reached the same conclusion.

Concluding that the case was correctly decided, the Solicitor General notes that most of petitioners' liability claims "turn largely upon the particular factual circumstances of this case and the application of well established principles of securities and tort law" (S.G. Br. at 2).* But this Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925) (Holmes, J.); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924).

* As shown in our brief in opposition (at 22-27), proof of *scienter* was overwhelming here and causation was a matter of mathematical certainty. A stronger case on these fact issues is difficult to imagine.

On the standing issue, the Solicitor General concludes that Chris-Craft clearly had the right to sue under Section 14(e) of the Williams Act based on the statute's language and legislative history, all the relevant authorities, and the public policy favoring private enforcement of the securities laws stressed by this Court in *J. I. Case* v. *Borak,* 377 U.S. 426 (1964). Contesting the Solicitor General, petitioners cite *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), and a recent Ninth Circuit decision, *Klaus* v. *Hi-Shear Corp.,* [Current] CCH Fed. Sec. L. Rep. ¶95,404 (9th Cir. 1975).

The Solicitor General properly pointed out that *Blue Chip* (S.G. Br. at 16-17) was wholly consistent with Chris-Craft's standing here. Section 14(e) does not contain the buyer-seller requirement involved in *Blue Chip;* and this case, unlike *Blue Chip,* is certainly not a "vexatious" litigation. Far from it, this case involves massive injury by admitted violations against Chris-Craft's $60 million investment.

The *Klaus* opinion is correctly distinguished by the Solicitor General (S.G. Br. at 18, n. 9), who notes that the court there merely denied a preliminary injunction because of lack of irreparable injury; and that the court there did not even refer to the instant case. Moreover, *Klaus* did not involve the issue of standing. On the contrary, the defendant target-company there conceded that the offeror had standing and a right to seek damages.*

* Hi-Shear—the target company—did not dispute that if it had made misleading statements to its shareholders to discourage their acceptance of the tender offer, Klaus, the tendoror, would have had the right to relief under Section 14(e) (Brief of Hi-Shear Corp., Dkt. No. 75-1444 at 46). But it contended that its actions were not improper and that, in any event, because Klaus had an action under Section 14(e) for money damages, no irreparable injury existed (Brief of Hi-Shear Corp., Dkt. No. 75-2380 at 49).

Klaus, moreover, indicates that it rests on the Ninth Circuit's interpretation of this Court's recent opinion in *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975). That opinion, like the Solicitor General's brief, recognizes that the Williams Act was intended to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" (422 U.S. at 58-59). Moreover, *Rondeau* stresses, as does the Solicitor General, that this Court has not hesitated "to fashion private remedies for securities laws violations when to do so is consistent with the protection of investors as a supplement to enforcement by the Securities and Exchange Commission," citing *Borak* (422 U.S. at 62). The landmark *Borak* decision found an implied cause of action for opponents of management under Section 14(a) in proxy contests. Four years after *Borak,* Congress passed Section 14(e) to bring tender offers under the same standards of fair play as proxy contests. It would make no sense to recognize standing if a party proceeded by a proxy fight but not if he proceeded by a tender offer.

The Solicitor General's views on standing are clearly correct, as shown by the foregoing cases and by the long line of authorities cited in our brief in opposition (at 19-20) recognizing that all parties in a control contest may sue to prevent fraudulent or deceptive acts.* As Judge Friendly stated in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 940 (2d Cir. 1969), cited by the Solicitor General (Br. at 14), Section 14(e) in effect "applies Rule 10b-5 both to the offeror and to the opposition." In-

* First Boston (Br. at 4) seeks to belittle *Smallwood* v. *Pearl Brewing Co.,* 489 F.2d 579 (5th Cir. 1974), and *H.K. Porter Co., Inc.* v. *Nicholson File Co.,* 482 F.2d 421 (1st Cir. 1973). But both cases specifically cited and followed the rationale of *Chris-Craft* on standing.

deed, Section 14(e) was adopted to dispel any questions about standing. Thus, this Court denied certiorari in *Crane Company* v. *Westinghouse Air Brake Company,* 419 F.2d 787 (2d Cir.), *cert. denied* 400 U.S. 822 (1970), where judgment was rendered in favor of a tender offeror. There, the Second Circuit stated that the adoption of Section 14(e) "should serve to resolve any doubt about standing in tender offer cases" (419 F.2d at 799). Indeed, it has had that effect since recent cases under Section 14(e) no longer even bother to raise the issue of standing.* Thus, as the Solicitor General notes (S.G. Br. at 18), "there may be less reason to review this issue now than when this Court previously denied certiorari."

The Solicitor General's conclusion (S.G. Br. at 15) that a private right of action for all parties in control contests is a vital alternative to increased government intervention makes particularly relevant today the observation of Roscoe Pound:

> "From the beginning, the main reliance of our common-law system has been individual initiative. The main security for peace at common law is private prosecution of offenders . . . [T]he individual is supposed at common law to be able to look out for himself and to need no administrative protection." Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice,* 8 Baylor L. Rev. 1, 13 (1956).

* *E.g., Alaska Interstate Co.* v. *McMillan,* [Current] CCH Fed. Sec. L.Rep. ¶95,276 (D. Del. 1975); *Commonwealth Oil Refining Co.* v. *Tesoro Petroleum Corp.,* 394 F.Supp. 267 (S.D.N.Y. 1975); *Copperweld* v. *Imetal,* 403 F.Supp. 579 (W.D. Pa. 1975); *Emhart Corp.* v. *USM Corp.,* 403 F.Supp. 660 (D. Mass. 1975); *Mesa Petroleum Co.* v. *Aztec Oil and Gas Co.,* [Current] CCH Fed. Sec. L.Rep. ¶95,424 (N.D. Tex. 1976).

Section 11

First Boston, in its principal attack on the Solicitor General, continues the charade that it was merely found guilty of breaching its duty of due diligence under Section 11 of the 1933 Act and thus cannot be liable to Chris-Craft for compensatory damages under Section 14(e) of the 1934 Act. But the Solicitor General points out (S.G. Br. at 20) that the Second Circuit found that First Boston's conduct went "far beyond mere negligence." It had *actual knowledge* of the overvaluation of BAR because it had read Bangor's minutes that the railroad, listed in the prospectus as being worth $18 million, was for sale to the only willing buyer at $5 million (A 51-55). Accordingly, the Solicitor General correctly concludes (S.G. Br. at 20) that "[s]ince the court of appeals imposed a requirement of *scienter* in finding a violation of Section 14(e), it would have been inappropriate to limit liability to that which could arise from mere negligence under Section 11."

That conclusion is indisputably correct, as shown by First Boston's own concession in its trial memorandum, cited in our brief in opposition (at 33), and by the unbroken chain of authorities over the past quarter of a century following Judge Frank's landmark opinion in *Fischman* v. *Raytheon Manufacturing Co.,* 188 F.2d 783 (2d Cir. 1951). Those authorities are also cited in our brief in opposition (at 32-33).

First Boston's Section 11 claim as to a limitation on the amount of its damage exposure is surely blown out of all proportions today because First Boston has agreed with Bangor, according to their public announcements, to share

the judgment equally if certiorari is denied and to pursue contribution claims against the Pipers. By virtue of this sharing agreement, First Boston has significantly reduced its exposure: it would now bear little more burden under this agreement than under its unprecedented interpretation of Section 11.*

Damages

The Second Circuit calculated damages at $37 per share (B 31). The Solicitor General, using an alternative approach, calculates damages at $37.50 per share (S.G. Br. at 24). Both figures are virtually identical.

The Second Circuit, although agreeing with the Solicitor General that his "expectancy" formula of damages would have been fairer to Chris-Craft (B 21), used a more conservative standard because it wished to bring an end to this protracted litigation (B 24-25). It thus emphasized that its award, based on Chris-Craft's actual cost without an expectancy premium, was "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). The Solicitor General, recognizing that his approach and the Second Circuit's formulation

* While concluding that the Second Circuit correctly held First Boston liable for compensatory damages despite Section 11's special limitation on damages and recommending against a review of the Section 11 issue by this Court, the Solicitor General notes (S.G. Br. at 21, n. 12) that the court might nevertheless wish to remand to the Second Circuit for "explicit consideration" of this issue. But First Boston does not endorse that suggestion, which would prolong this 7-year-old litigation for no valid reason. Moreover, First Boston squarely raised the Section 11 issue before the Second Circuit in its petition for rehearing in *Chris-Craft III*. The court denied that petition—a sound result because it had rejected First Boston's claim of lack of *scienter* as "frivolous" (B 40, n. 30).

produced "roughly comparable" results (Br. at 23), concludes that the measure of damages does not warrant a grant of certiorari (Br. at 24).

Petitioners, attacking the Solicitor General, complain that there was a $15,000,000 overassessment of damages because he used the wrong numbers in doing the arithmetic under his expectancy formula. That claim is without merit. For the fact is that the Second Circuit itself, in order to verify its conservative damage calculation, also used the type of expectancy formula recommended by the Solicitor General; and, in doing so, the court filled in the formula with the numbers provided from the mouth of defendants' star expert witness (B 31-32, n. 24). Using that alternative mathematical exercise, the Second Circuit came up with virtually identical damages to those computed in the body of its opinion and by the Solicitor General in his brief.

Thus, petitioners' rhetoric about damages is a tempest in a teapot. The Second Circuit tailored the damages to the unique facts of this case, giving defendants the benefit of all doubts to conclude this over-aged litigation. This Court does not sit to allow litigants "a second appeal" (*Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 453 (1959), or to perform academic exercises in calculus.*

* Petitioners stress a footnote in the Solicitor General's brief (at 23, n. 14) which questions the $27 per share value used by the Court of Appeals on the theory that this compensates Chris-Craft for a decline in the market between September 5, 1969 (the date Bangor obtained control) and January 1970. But the court's use of January 1970—the first date on which the stock could have been sold via a registered public offering—was clearly correct. The well-settled rule is that an interest which is not readily marketable is valued at the date of the first reasonable sale. *United States* v. *Swift & Co.*, 270 U.S. 124, 149 (1925).

(footnote continued on next page)

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted] 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Finally, even if there were any factual questions as to the precise calculation of damages, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946).

Conclusion

The Solicitor General, contrary to petitioners' claims of bias, acted independently and fairly in this matter and conducted an exhaustive review of this complex factual case, with other interested agencies of the government—a

---

In any event, as the Court of Appeals noted (B 31-32, n. 24), defendants' own star expert admitted that Chris-Craft's large block could not have been sold for more than $32 per share on September 5—and at that price *only* if a buyer could be found. There was no buyer for Chris-Craft's large minority block. The figure of $48 per share mentioned in the footnote was the District Judge's hypothetical value on September 5 for a 100-share block, not Chris-Craft's 700,000 share block; and the $41-$43 figure cited in the footnote was defendants' experts' estimate for a hypothetical but impossible September 5 public offering from which he testified a 25% to 35% discount had to be taken for a private sale if a buyer could have been found (B 31-32, n. 24). The date and price of a first sale in this complex securities case are the type of factual issues which are not properly the subject of certiorari. Accordingly, the Solicitor General himself in the footnote in question concludes that this issue "does not appear to be of sufficient general importance to warrant review by this Court."

review that required four months of study of the voluminous record of this 7-year-old litigation. The Solicitor General's independent conclusions that the case was correctly decided and that the quantum of damages was appropriate are fully supported by the record and by well-worn and traditional principles of law.

Chris-Craft lost the control contest, and suffered massive damages, because it obeyed the law. Bangor won the contest because it broke the law. There is no genuine dispute about that. Nevertheless, this case has now dragged on for seven years. It has been before the Second Circuit on three occasions, once *en banc*, and there were three requests for rehearing. The case now has been before this Court on two occasions and 18 separate briefs have been filed in this Court. We submit that it is time to bring this litigation to an end, particularly now in view of the Solicitor General's independent and reasoned conclusion that certiorari is not justified.

Respectfully submitted,

Simon H. Rifkind
Arthur L. Liman
Attorneys for Respondent
345 Park Avenue
New York, New York 10022

Paul, Weiss, Rifkind,
Wharton & Garrison
Stuart Robinowitz
Jack C. Auspitz
Anthony M. Radice
Carol Goodman
Of Counsel

Dated: March 10, 1976